From:	Justia Verdict
To:	Kutches, Brandon (SHF)
Subject:	Vikram David Amar - What the Alabama Confederate Memorial Case Says About Modern Constitutional Doctrine - Jan 25, 2019
Date:	Friday, January 25, 2019 8:04:23 AM

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Click here to view in your browser if you are having trouble viewing this email.

Verdict - Legal Analysis and commentary from Justia.

What the Alabama Confederate

Memorial Case Says About Modern Constitutional Doctrine

Vikram David Amar Jan 25, 2019

Last week an Alabama trial court judge (Michael Graffeo) made national news when (literally just minutes before his judicial term expired and he began retirement) he held that the Alabama Memorial Protection Act (AMPA)—which prohibits public jurisdictions within the state from altering or otherwise disturbing public monuments that have been in existence for at least forty years—violated the Fourteenth Amendment free speech and due process rights of the City of Birmingham, which sought to be able to place and maintain plywood

screens around the Confederate Soldiers and Sailors Monument in the city's Linn Park. The ruling, while perhaps well-intentioned, was constitutionally misguided, and illustrates a few prominent and problematic features of modern First Amendment and federalism doctrines.

Summary of the Ruling

The Alabama trial judge ruled that, "although a state's legislative control over municipalities is extensive," municipalities "including those in Alabama, have rights" which include a "'legally protected right' to free speech." From there, the court held that because Birmingham was attempting to speak (or, rather not to speak) when it sought to board up and obstructing visual access to the Confederate monument, the state of Alabama—on which "the U.S. Constitution's limitations on speech regulation apply"—could not interfere. Recognizing Birmingham's right to speak free from state interference was indicated by Supreme Court precedent, the judge observed, because the Court, as early as 1960 in *Gomillion v. Lightfoot*, "rejected the argument that the States have the power to do as they will with municipal corporations regardless of consequences" and instead held that "legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." In Judge's Graffeo's words: "Just as the state could not force any particular citizen to post a pro-Confederacy sign in his or her front lawn, so too can the state not commandeer the city's property for the state's preferred message." (The judge also ruled that AMPA violated Birmingham's Fourteenth Amendment's due process rights, but my focus here is on the free speech aspects of the dispute.)

The Flaws in Judge Graffeo's Analysis

The Alabama court's analysis under the federal Constitution is muddled and deeply flawed in many (related) respects. Yes, governments (including municipalities) can engage in speech, and the Supreme Court has made clear that the erection, placement and maintenance of monuments is one way in which governments do speak. And yes, states cannot ignore federal constitutional limitations when they tell cities what to do and refrain from doing. But neither of those observations addresses the key question in this case: what, if anything, in the federal Constitution interferes with a state's control over its subdivisions, which control is ordinarily a matter reserved for state law?

(This intra-state autonomy explains why cities are considered “state actors” under the Fourteenth Amendment—in general, the federal Constitution is agnostic about how states divvy up powers internally among state-level and local units; from the Fourteenth Amendment’s point of view, all public entities within a state are the state itself.)

In other words, there is nothing inherently unconstitutional about a state retaining for itself, rather than delegating to cities within it, the power to regulate private speech and engage in government speech within the state. The cases recognizing public monuments as speech are of no real relevance to this question, since they do not involve intra-state conflicts about who is the appropriate decisonmaker when it comes to public speech. Nor is *Gomillion* helpful because it involved an instance in which a state was manipulating a municipality’s boundaries to violate the Fifteenth Amendment voting right of individual African American citizen-voters—the rights of municipal entities as such were simply not at issue.

Now perhaps someone might argue that the AMPA in fact violates the federal equal protection rights of African Americans because it is invidiously motivated by a desire to preserve Confederate monuments in order to send messages of racial animosity to blacks, and because the preservation of such monuments has a disparate impact along racial lines. I think such an argument would face an uphill climb, but if it were to be embraced, then the State of Alabama could not use Birmingham to implement its unconstitutional AMPA aims. But that isn’t the argument that was made to or accepted by Judge Graffeo.

Or perhaps there are provisions in Alabama’s state constitution that protect local decisionmaking—many state constitutions provide for “home rule” or “charter cities” that enjoy legal independence from the state legislature. But again, that was not the argument made or accepted, and has little to do with the federal Constitution generally or First/Fourteenth Amendment rights of cities in particular.

Takeaways

It might be tempting to view Judge Graffeo’s ruling as a one-off mistake (or a parting political message) by a single state-court judge, and something that will likely be corrected as the case moves up the appellate ladder. And Judge

Graffeo's mistaken ruling likely will get fixed on appeal. But I think there are a few broader lessons we can and should take from this episode.

Lesson #1: Compelled Speech is the Cutting Edge of the First Amendment

Most cases in which free speech rights are invoked involve government regulations that arguably suppress or regulate the speech in which individuals or entities seek to engage. But increasingly, the courts are dealing with disputes in which the First Amendment claim is not that government has constrained speech, but that it has compelled speech that someone would prefer not to utter or convey. In the last Supreme Court term, three of the most high-profile cases (the Illinois public-sector union fair-share-fee contest, *Janus v. American Federation of State, County and Municipal Employees*; the California pregnancy crisis center placard dispute, *National Institute of Family and Life Advocates (NIFLA) v. Becerra*; and the Colorado baker gay-marriage case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*) all involved claims of improperly compelled speech. The Court ruled in favor of the compelled speech claim in *Janus* and *NIFLA* and punted on the issue in *Masterpiece Cakeshop*. Judge Graffeo used the same kind of reasoning, albeit on behalf of a city rather than a private person or entity: because Birmingham no longer wants to speak via the presence of the confederate monument, it has a right not to engage in (government) speech it no longer wishes to utter. Although, as explained above, the claim should be unavailing because of intra-state federalism principles, we should recognize that when, in the words of Justice Kagan's *Janus* dissent last year, the First Amendment is being "weaponized," the preferred instrument of mass destruction these days is the notion of compelled speech.

Lesson #2: Judge Graffeo is Not Alone in his Misunderstandings

The Supreme Court tried to anticipate and avoid missteps like that taken by Judge Graffeo when, in 2011, in *Nevada Commission on Ethics v. Carrigan*, it overwhelmingly held that when a state legislator undertakes to vote on a pending legislative matter, he is not engaging in free speech protected by the First Amendment, because the "legislative power" of a state government entity

is not “personal to the legislator but belongs to the people.” That case involved a state law that required recusal by state officials when their impartiality could reasonably be questioned. A member of a local city council challenged the power of the state to prevent him from voting on a land-use matter, and the Nevada Supreme Court (making mistakes similar to those made by Judge Graffeo) invalidated the state law, in favor of the autonomy of local city council members. The Supreme Court may need to speak again, and more explicitly, to confirm the internal authority states have over their subdivisions in governmental speech matters.

But misperceptions about how much autonomy the federal Constitution confers on local government officials who might disagree with state-level edicts is not limited to free speech. In the immigration sanctuary setting, for example, the US Court of Appeals for the Second Circuit made a similar mistake. At issue was a federal law prohibiting state-law measures that inhibit information sharing between state/local officials with federal immigration authorities. In rejecting a claim by a state that such federal intrusion constitutes unconstitutional commandeering of state governmental processes, the Second Circuit reasoned that although the federal government may not compel states and localities to carry out federal programs, it may prohibit them from restricting state and local officials from “voluntarily” exchanging information with federal authorities.

The Second Circuit’s logic suffers from the same problems that plague Judge Graffeo’s analysis. The Second Circuit believes that individual state and municipal officials ought not to be constrained by state law from “voluntarily” cooperating with federal authorities by providing information. But state and municipal officials in this setting are not operating as private citizens who voluntarily get to decide how to spend their time and resources. Instead, they are operating as state government actors, whose discretion to voluntarily act while on the job is heavily circumscribed by state and local laws. The “voluntary” decision whether to devote state and local resources to federal enforcement is (or ought to be) located at the level of state or local government, not at the level of the individual state or local employees. State resources—including the time and information of state employees—are owned by the state, and not by individual employees. Thus, I find it hard to know what “voluntary” means in this setting.

To see the flaws in the Second Circuit’s rationale, let us imagine a variant on the

facts of the famous *Printz* commandeering case. *Printz* itself involved a provision in the federal Brady Handgun Violence Protection Act that required local law enforcement officials to conduct background checks on people seeking to buy firearms during an interim period when the federal government was in the process of setting up its own background-checking system. This was the provision the Court struck down as impermissibly interfering with state-law enforcement decisions and impermissibly compromising political accountability. But suppose that the Brady Act provision had instead said something such as:

> No state or local government can adopt or enforce any law or policy that prevents any local law enforcement official from using public resources—including employee time and equipment—to conduct background checks to assist the federal government's gun control efforts, if the local official voluntarily chooses to expend state and local resources for this purpose, even if such assistance to the federal government diverts enforcement resources from other areas prioritized by state law.

Could anyone believe that such a law would have been allowed by the *Printz* majority? I think not. And yet such an implausible premise is precisely what undergirds the Second Circuit's reasoning (and that of Judge Graffeo's ruling too).

Follow @prof_amar

Vikram David Amar is the Iwan Foundation Professor of Law and the Dean at the University of Illinois College of Law. Previously, he served as the Associate Dean for Academic Affairs and Professor of Law at the University of California, Davis School of Law. He is a 1988 graduate of the Yale Law School and a former clerk to Justice Harry Blackmun. He is a co-author, along with William Cohen and Jonathan Varat,

of a major constitutional law casebook, and a co-author of several volumes of the Wright & Miller treatise on federal practice and procedure. Before teaching, Professor Amar spent a few years at the firm of Gibson, Dunn & Crutcher.

RECENT ARTICLES

MITSUBISHI BANK'S MUSEUM OF TRUST IN TOKYO

BU Law emerita professor Tamar Frankel explains why the Mitsubishi Bank's Museum of Trust in Tokyo, Japan, which opened a few years ago, could serve as a model for the United States to reduce the cost of mistrust and breach of trust in this country. Frankel describes the museum and considers how it affects people's perception of the importance of trust in society.... Read More

HOW SHOULD THE LAW ADDRESS ILLICIT MOTIVES IN THE AGE OF TRUMP?

Cornell law professor Michael C. Dorf comments on a case arising from the Trump administration's decision to add a citizenship question to the 2020 census questionnaire—a case the US Supreme Court had on its calendar for oral arguments until late last week, when the federal district judge issued an opinion and enjoined the government from including the question. Despite the original issue presented in the case (a technical one about the scope of discovery) being made moot by the district court opinion, Dorf discusses the remaining and greater issue of how to discern and address illicit government motives.... Read More

#METOO GOES GLOBAL: INTRODUCING THE #METOO TREATY

Illinois law professor Lesley Wexler discusses a draft treaty by the International Labor Organization that would address, on a global scale, many of the issues of workplace harassment and sexual assault that the #MeToo movement has brought into the spotlight. Wexler describes how the treaty is grounded in

human rights language and would create protections for workers far more expansive than even those recognized under current US law, such as Title VII of the Civil Rights Act of 1964. ... Read More

Have friends who like law?
Forward this email.

Like Verdict
for legal discussions on Facebook.

Follow @verdictjustia
for news and updates on Twitter.

Contact Us | Privacy Policy

Unsubscribe From This Newsletter
or unsubscribe from all Justia newsletters immediately **here.**

You received this email because you have subscribed to the Verdict News E-Mail Feed.

If you are experiencing problems with this newsletter, please email our tech support team at verdictsupport@justia.com.

Justia | 1380 Pear Ave, Suite 2B, Mountain View, CA 94043